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Supreme Court, U.S.
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In The

Supreme Court of the United States

EWAN BRYCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DO THE FIFTH AMENDMENT'S PROTECTION AGAINST DOUBLE JEOPARDY AND ITS GUARANTEE OF DUE PROCESS OF LAW, IN CONJUNCTION WITH THE SIXTH AMENDMENT'S GUARANTEE OF TRIAL BY JURY, PRECLUDE A DISTRICT JUDGE FROM INCREASING A DEFENDANT'S SENTENCE UPON REMAND FOLLOWING AFFIRMANCE OF THE CONVICTION ON APPEAL, UPON THE BASIS OF CONDUCT OF WHICH THE JUDGE AND THE GOVERNMENT WERE AWARE PRIOR TO THE DEFENDANT'S INITIAL SENTENCING AND OF WHICH THE DEFENDANT WAS ACQUITTED AT A JURY TRIAL WHICH TOOK PLACE BETWEEN THE DATE OF THE REMAND FROM THE COURT OF APPEALS AND THE DATE OF THE SECOND SENTENCING?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ewan Bryce, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on April 22, 2002, and was published at 287 F.3d 249. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on April 6, 2001. It was published at 141 F. Supp. 2d 269. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . "

STATEMENT OF THE CASE

In an indictment handed down in December of 1997, the petitioner Ewan Bryce was charged with conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1) and 846. In a second count of the same indictment, he was charged with possessing with intent to distribute, and with distributing, the same quantity of the same substance, in violation of 21 U.S.C. §841(a)(1). He was convicted of both counts at a jury trial in April of 1998.

Prior to that trial, a government informer named Jermaine Fitzpatrick, who was an acquaintance of Mr. Bryce's and had been supplying the government with information concerning him, was murdered in Mr. Bryce's presence. From the moment of the murder, the government believed Mr. Bryce was the killer; he was taken into police custody at the scene and interrogated at length, but released for lack of sufficient evidence.

These facts were brought to the attention of the trial judge during Mr. Bryce's trial in April of 1998. On the first day of that trial, the government sought to have Detective

Dennis Sikoski of the Hartford Police Department identify Mr. Bryce's voice on a tape recording of a wiretapped conversation. The government based that attempted voice identification upon Detective Sikoski's three-hour interrogation of Mr. Bryce in connection with the murder. At a side-bar proffer, the Assistant United States Attorney advised the court: "Your Honor, the defendant was interviewed in connection with a homicide at which he was present, and this happened after he was indicted. . . . I've informed [defense counsel] previously that I intended to elicit this information at trial. However, not to bring forward the fact that it was in the context of a murder investigation which may involve Mr. Bryce, himself. . . . " Later, the prosecutor elaborated: "Mr. Bryce was personally present when a person alleged to be a federal cooperating witness was murdered by being shot in the chest and the face in excess of ten times. He was one of the two people who was present there, and he was interviewed almost immediately after the murder in regard to his knowledge of the murder and his involvement in the murder. He was interviewed by Hartford police officers and FBI agents who were accompanying Hartford police officers. It is my understanding that the interview was limited to homicide investigation."

Based in part on the testimony of Detective Sikoski, Mr. Bryce was convicted on both counts of the indictment. He was sentenced on August 17, 1998, to identical concurrent sentences of 124 months on each of the two counts. On appeal, the Second Circuit held that there was insufficient evidence to support Mr. Bryce's conviction on the second count. Accordingly, in its published opinion, the court reversed his conviction on Count Two, affirmed his conviction on Count One, and remanded "for resentencing."

United States v. Bryce, 208 F.3d 346, 356 (2d Cir. 2000). The final version of that decision was handed down on March 7, 2000. However, that portion affirming Mr. Bryce's conviction on Count One was issued originally on August 24, 1999, and never challenged by either party. The government, however, sought and obtained reconsideration of the court's ruling on Count Two, resulting in the additional delay in issuance of the last of several mandates in the case. The mandate, when it was issued, said nothing about resentencing. The mandate stated that "it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district be and it hereby is affirmed in part, reversed in part, and the case is remanded to the district court for further proceedings in accordance with the opinion of this court."

Meanwhile, Mr. Bryce had been indicted for the murder the government had disclosed to the district judge on the record in April of 1998. That indictment, handed down in 1999, charged Mr. Bryce in two counts with the single murder of the government informer. The case was assigned to the same district judge and went to trial in September of 2000. Mr. Bryce was acquitted.

Only then, months after remand, did the district court schedule the resentencing which had been ordered by the Court of Appeals in its opinion of March 7, 2000. A hearing was conducted on February 23, 2001. The court there held that it had power to resentence Mr. Bryce on Count One of the indictment and that in doing so it could consider whether he had committed the murder of which he had been acquitted. The court, rejecting the jury's implicit finding that the government's jailhouse witnesses were liars, held that in its opinion Mr. Bryce had committed the murder prior to his original trial in the drug case and

increased his sentence to the maximum permitted by the statute, which was essentially twice that which originally had been imposed.

After the petitioner filed his appeal, the district judge issued a "Memorandum Opinion" stating his reasons. Among other things, the court said it had sentenced Mr. Bryce to twice his original sentence because that was the statutory maximum for the offense of conviction; it would have sentenced him to life had the statute permitted it. The eyewitness, whose testimony exonerated Mr. Bryce, was found not credible by the court because of her "demeanor". The court held that the evidence concerning the murder was "new" and permitted its action despite the defendant's contentions that resentencing was barred by the due process presumption of vindictiveness under circumstances like these, and prohibited by the double jeopardy clause of the Fifth Amendment. Distinguishing *United States v. Pisani*, 787 F.2d 71, 75-76 (2d Cir. 1986).

The Second Circuit affirmed, holding in a ruling which is without precedent, that in a case where identical sentences were imposed on each of two counts, so that there was no "package" sentence imposed, and on appeal only one of those two convictions is reversed, the trial court nevertheless is free to resentence on the affirmed count. The Court of Appeals further held that, although the government had alerted the district judge before the original sentencing to its suspicions that the petitioner had murdered its witness, the government lacked until sometime after the original sentencing but before the petitioner's murder trial the testimony of a jailhouse witness, whose testimony was rejected by the petitioner's jury but accepted by the district judge and allegedly was a "key witness. . . . " 287 F.3d at 254. Holding, therefore,

that resentencing is permitted even when a conviction has been affirmed on appeal and that the district court had new evidence before it when resentencing took place, and taking it for granted that the district court was not bound by the jury's acquittal of the petitioner, the Second Circuit held that the doubling of petitioner's sentence violated neither the Fifth nor the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

I PETITIONER'S FIFTH AMENDMENT RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED WHEN THE DISTRICT COURT, AFTER APPEAL, RESENTENCED HIM TO AN INCREASED SENTENCE ON A COUNT WHICH HAD BEEN AFFIRMED, AND AS TO WHICH HIS SENTENCE HAD NOT BEEN VACATED, WHEN THE ORIGINAL SENTENCE WAS NOT PART OF A "PACKAGE SENTENCE"

When a defendant appeals from the judgment in a criminal case, the sentence is not considered final for purposes of the Fifth Amendment's protection against double jeopardy, until the judgment has been affirmed. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

The defendant in this case did appeal his conviction on the First Count of the indictment as well as his conviction on the Second Count. The court, however, affirmed his conviction on the First Count. Indeed, it did so as early as August, 1999. While the government challenged, by motion for reargument, the court's holding overturning the conviction on Count Two, no such challenge was filed by either

party to the order affirming the conviction, and sentence, on Count One.

There arises, therefore, from that very fact a presumption that the sentence imposed on Count One could not be tampered with on remand. See generally, *e.g.*, *United States v. Fogel*, 829 F.2d 77, 264 U.S. App. D.C. 292 (1987); *United States v. Gevaras*, 961 F. Supp. 192 (N.D. Ohio 1996).

A number of cases, however, primarily in the pre-Guidelines era, carved out an exception to this general rule. That exception applies to so-called "package sentences" where a court intends a specific net sentence and achieves that result by imposing consecutive sentences, below the statutory maximum, on various counts. When the conviction on some of those counts is reversed, it has been held that resentencing is permissible on the affirmed counts so as not to defeat the original intention of the sentencing judge. *E.g.*, *United States v. Gelb*, 944 F.2d 52 (2d Cir. 1991); *United States v. Murray*, 144 F.3d 270 (3d Cir. 1998); *United States v. Smith*, 115 F.3d 241 (4th Cir. 1997); *United States v. Benbrook*, 119 F.3d 338 (5th Cir. 1997); *United States v. Oliver*, 941 F. Supp. 1109 (M.D. Ala. 1996); *Santiago v. United States*, 954 F. Supp. 1201 (N.D. Ohio 1996).

The "package sentence" exception, however, does not apply to "non-interlocking" sentences. *McClain v. United States*, 676 F.2d 915, 918 (2d Cir. 1982). See also *United States v. Gelb*, *supra*, 944 F.2d at 58-60; *United States v. Pisani*, 787 F.2d 71, 74-76 (2d Cir. 1986). The goals of the "package sentence" exception are inapplicable to this case because (a) the sentences did not interlock and (b) the sentence imposed on Count One was, except for the $100

special assessment imposed on Count Two, the entire, total, full sentence that had been imposed in the case.

Moreover, the sentence on Count One became final, when affirmed in a decision which – as to that aspect – was never challenged thereafter, in August of 1999 – well over a year before the district court chose to resentence Mr. Bryce over his objection and to double his sentence.

II THE DISTRICT COURT FAILED TO OVERCOME THE PRESUMPTION OF VINDICTIVENESS, AND THUS DENIED THE DEFENDANT DUE PROCESS OF LAW, WHEN IT DOUBLED HIS SENTENCE FOLLOWING HIS UNSUCCESSFUL APPEAL ON THE BASIS OF ALLEGED MISCONDUCT PRIOR TO THE FIRST SENTENCE OF WHICH THE DISTRICT COURT WAS, OR SHOULD HAVE BEEN, AWARE AT THE TIME OF THE ORIGINAL SENTENCING

Due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). While concern that the individual defendant not suffer retribution for a successful appeal plays a part in the prohibition upon such sentence increases, the greater concern is to avoid the chilling effect such increased sentences upon remand will inevitably have upon future defendants' exercise of their appellate rights. Thus, the rule is "a prophylactic one, addressed more to protect future litigants who appeal than to the injustice done in the actual case. Tolerance of a court's vindictiveness might 'chill' a defendant's right to seek an

appeal of her sentence." *United States v. Campbell*, 106 F.3d 64, 67 (5th Cir. 1997).

Due process, accordingly, establishes an objective "presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374 (1982). The presumption is an objective one, which because it is objective implies no disrespect to the sentencing judge. And it can be overcome only by objective evidence in the record, and not by the judge's protestations of his nonvindictive motivation. "The great deference we owe to district courts' sentencing is erased by the *Pearce* presumption when a harsher sentence is imposed on resentencing, and the sentencing court must rebut the presumption of vindictiveness with some objective reason for its reassessment." *United States v. Resendez-Mendez*, 251 F.3d 514, 517 (5th Cir. 2001).

The *Pearce* rule emphatically prohibits courts at resentencing from increasing the defendant's sentence on the basis of facts which were, or could have been, known to the court at the time of the original sentencing. The type of objective evidence which can overcome the presumption of vindictiveness is "relevant conduct or events that occurred *subsequent* to the original sentencing proceedings." *Wassman v. United States*, 468 U.S. 559, 572 (1984). (Emphasis supplied.) *Pearce* itself expressly held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding*." 395 U.S. at 726. (Emphasis supplied.)

Accordingly, it has been held that a defendant's indictment and conviction in state court for murder following the imposition of the first sentence in federal court could not overcome the objective presumption of vindictiveness for an increased sentence after a successful appeal when the murder underlying the state court conviction had occurred before the original federal sentence was imposed. *United States v. Williams*, 651 F.2d 644 (9th Cir. 1981).

If it ever is permissible to increase a sentence on the basis of asserted facts that existed prior to the first sentence, a dubious proposition, it is not permissible to do so just because the government did not seek a delay of the first sentencing to enable it to present the enhancing facts or the sentencing judge was insufficiently thorough the first time around. "We regard it as much more doubtful whether a heavier sentence is justified simply because, as here, the second judge went to more pains in investigating defendant's general behavior prior to the initial sentence than did the first. The Government could have asked Judge Dawson to defer Coke's sentence after the first conviction . . . and this could have developed the additional facts . . . that led Judge Cooper to increase the sentence. In these situations the important interest that appeals not be deterred outweighs the Government's rather slight interest in an increased sentence because of facts that were or could have been brought before the first judge." *United States v. Coke*, 404 F.2d 836, 846 (2d Cir. 1968) (*en banc*) (Friendly, J.).

In this case, the objective fact is that the murder, and the fact that the petitioner was suspected of committing it, were actually brought to the attention of the sentencing

judge four months before the first sentencing. The fact that the government then elected not to develop the matter, or to seek a sentence increase because of it, and the fact that the judge elected not to pursue the matter, either, before imposing sentence, cannot constitute objective evidence of new facts warranting an increased sentence after remand.

III. THIS COURT'S RECENT RULING IN *RING V. ARIZONA* CASTS DOUBT UPON THE CONTINUED VIABILITY OF *UNITED STATES V. WATTS* AND SUGGESTS THAT THE DISTRICT COURT MAY NOT INCREASE A DEFENDANT'S SENTENCE ON THE BASIS OF ALLEGATIONS OF WHICH A JURY HAS ACQUITTED THE DEFENDANT

In *United States v. Watts*, 519 U.S. 148, 154-57 (1997), this court held that a sentencing judge may impose sentence upon the basis of factors of which a jury has acquitted the defendant. That doctrine found its most extreme application ever in the present case, in which the petitioner was acquitted of a murder but, on resentencing, the district court doubled his previous sentence solely on the basis of a finding that, contrary to the opinion of the jury, the court believed the petitioner had committed that crime. Both lower courts in this case assumed that *Watts* permitted the court to act as it did in this case, assuming that the Fifth Amendment factors previously discussed were not a bar.

Since the Second Circuit handed down its ruling, however, this court has decided *Ring v. Arizona*, ___ U.S. ___, 70 U.S.L.W. 4666 (2002). While *Ring* involved the difference between a life sentence and a death sentence, on

the basis of factors found by the trial judge, there is in truth nothing beyond the "death is different" argument to distinguish it from the case here at bar. In this case, the petitioner already had been sentenced. The court later doubled that sentence solely on the basis of its disagreement with the jury's verdict in a case against the petitioner which was tried after the Court of Appeals had returned the matter to the district court but before that court had got around to the resentencing.

The concurring opinion of Justices Scalia and Thomas in *Ring* makes the essential point in respect to the present question: "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." 70 USLW at 4674. In *Ring*, this court took a significant step in the direction of recognizing that principle. It now should consider, in the extraordinary circumstances of the present case, whether the Sixth Amendment permits a district court, in effect, to set aside a jury acquittal with which it disagrees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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